Prohibition. The Motion was heard on April 9, 1983 when the court granted leave and a stay of the hearing of the cases against him at the Kadi's court, Alor Setar.

The Applicant's only ground is that by a Gazette Notification of the State of Kedah No. 286 dated June 4, 1981 the Fatwa issued by the Majlis Ugama Islam dated August 10, 1972 is binding on all Muslims resident in the State of Kedah. The Fatwa dated April 10, 1972 in short says that whosoever believes in the teachings of the Qadiani (Ahmadhi) sect is an apostate. Since the Applicant is a follower of the Ahmadhi sect and that the Majlis says that he is not a Muslim, therefore the Majlis Ugama Islam and its Syariah Courts have no jurisdiction to try him.

On the hearing of the Motion on April 16, 1983 both the parties agreed that the court write to the Muslim Religious Council of Kedah for their ruling whether the followers of the Ahmadhi sect is a Muslim or a non-Muslim.

The Muslim Religious Council replied and this was confirmed by the President of the Council and the Chairman of the Fatwa Committee who gave evidence in Court that a follower of the Ahmadhi sect is *not* a Muslim.

Now, the Law

This Application is made to the High Court under s.25(2) of the Courts of Judicature Act 1964 where the High Court in its exercise of the powers of issuing prerogative writs can, in suitable cases and in particular for the protection of fundamental liberties enshrined in Part II of the Federal Constitution, issue orders against any person or authority.

The Kedah State Administration of Muslim Law Enactment 9 of 1962, section 41(3)(a) and (b) conferred a jurisdiction to the Kadi's or the Syariah Court only to Muslims. This means that non-Muslims, (and the Applicant is a non-Muslim as declared by the Majlis itself,) are outside the jurisdiction of the Majlis and its Syariah Courts.

This being so, the Application is therefore allowed. In fact in his written submission the learned Legal Adviser using his own words says *"the Respondent* (i.e. the Majlis Ugama Islam and the Chief Kadi) *concede that the Applicant is not a Muslim and therefore is not subject to the jurisdiction of Mahkamah Syariah".*

The Motion is allowed, a Writ of Prohibition is hereby issued prohibiting the Chief Kadi of Kedah, his agents and/or servants from hearing cases Jenayah 1/83, 2/83, 3/83 and 4/83 Syariah Court, Alor Setar.

No order as to costs.

Motion allowed.

Solicitors: *R.C. Murugeson.*

CHENG SUN CHUEN v. LEE CHEE SENG

[O.C.J. (Yusoff Mohamed J.) July 9, 1983]
[Johore Bahru – Divorce Petition No. 37 of 1980]

Family Law – Marriage – Nullity – Jurisdiction – Both parties to the marriage must reside in Malaysia at time when proceedings were commenced – Law Reform (Marriage & Divorce) Act, 1976, s. 67 – Divorce Ordinance, 1952, s. 49(1)(b).

Jurisdiction – Nullity of marriage – Law Reform (Marriage & Divorce) Act, 1976, s. 67 – Divorce Ordinance, 1952, s. 49(1)(b)

The petitioner in this case sought for a nullity of marriage. Their marriage was contracted at the Civil Registry of Marriages at Johore Bahru on October 13, 1976. After the marriage, both the petitioner and the respondent were reported to live in Singapore though each at different addresses until the date of the petition. The ground of the petition was that the husband/Respondent had wilfully refused to consummate the marriage, i.e. voidable marriage.

Held: with the passing of the new Law Reform (Marriage and Divorce) Act 1976, with effect from March 1, 1982, the courts cannot under s. 67 of the said Act grant a decree of nullity of a marriage unless both the parties to the marriage reside in Malaysia at the time when the proceedings were commenced. The petition would therefore be dismissed.

Case referred to:

(1) *John Kershaw Tattersall Pickup* v. *Bertha Florence Pickup Otherwise Godfrey* [1946] M.L.J. 35

DIVORCE PETITION.

K. Anantham for the petitioner.

Cur. Adv. Vult.

Yusoff Mohamed J.: In this petition for declaration of nullity of marriage, the question that arises is one of jurisdiction of his court to grant the decree sought by the petitioner. The ground of the petition is that the husband (respondent)

had wilfully refused to consummate the marriage, that is, voidable marriage.

The marriage was contracted at the Civil Registry of Marriages at Johore Bahru on October 13, 1976. After the marriage, both the petitioner and the respondent were reported to live in Singapore though each at different addresses until the date of this petition.

The petition does not state where the parties were domiciled and upon this ground the petition was first adjourned for the petitioner's previous counsel to comply with the necessary requirements. Because of this, the petitioner after the adjournment changed her counsel and consequently one Mr. Anantham wrote to the court that the decision of the previous counsel to amend the petition was made erroneously and he requested that the petition be re-scheduled for hearing. This was complied with by the court.

At the hearing Mr. Anantham, as in his letters to the court, relied solely on section 4(2) of the Divorce Ordinance 1952 and said that since both requirements of the section have been complied with in that a marriage was purported to be monogamous and that it was celebrated in the Federation, the Court itself has no discretion but to entertain the application. Domicile was not in issue.

Section 4(2) of the Ordinance provides:–

"(2) Nothing herein shall authorise the court to make any decree of nullity of marriage except –

(a) where the marriage between the parties was contracted under a law providing that or in contemplation of which marriage is monogamous; and

(b) where the marriage to which the decree relates was celebrated in the Federation".

This section 4(2) does not authorise the Court, as it is clearly stated therein, to grant decree of nullity. It merely limits or restricts the powers of the Court in situations specified in the section. The powers of the court to grant such relief are as provided in section 3 of the Ordinance. That is:–

"to give relief on principles which in the opinion of the court, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings."

It is a basic principle in the English Court that it has jurisdiction to entertain proceedings for nullity of marriage if (and only if) either of the parties is domiciled in England and Wales on the date when the proceedings are begun or was habitually resident in England and Wales for one year ending with the date – see *Rayden* on Divorce 12th Ed. @ 74.

Now section 4(2) of our Divorce Ordinance 1952 is *in pari materia* with the Divorce Ordinance Cap. 84 of the Straits Settlements. In the case of *John Kershaw Tattersall Pickup* v. *Bertha Florence Pickup Otherwise Godfrey*[1], McElwaine, C.J. in a similar application for nullity on the ground of impotency held:–

"The Courts of the Colony have no power to give a decree of nullity of marriage based on impotence unless the parties are domiciled in the Colony ..."

and in respect of section 4(2), he said:–

"I am aware s. 4 Sub-s.1 of the Divorce Ordinance mentions domicil in connection with dissolution, and that s.4(2) does not mention domicil, but as Bateson J. points at p.41 of the report of the *Inverclyde* case: Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it. *I think the same remark applies to nullity on the ground of refusal to consummate."* (emphasis supplied).

In my view, before the Court can entertain the present proceedings, the petitioner must first establish the Court's jurisdiction in that either of the parties is domiciled in the Federation at the date when the proceedings were instituted. Or if she wishes to take advantage of the provision of section 49(1)(b) of the Divorce Ordinance 1952, to establish that she was ordinarily resident in the Federation for a period of 3 years immediately before the petition was filed. These have not been done.

Now, with the passing of the new Law Reform (Marriage and Divorce) Act 1976, my view is fortified in that with effect from March 1, 1982 the Courts cannot under section 67 of the Act grant a decree of nullity of a marriage unless both the parties to the marriage reside in Malaysia at the time when the proceedings were commenced.

Upon these grounds, this petition is dismissed.

Petition dismissed.

Solicitors: *Skrine & Co.*